FILE COPY

Office Supreme Court, U. S.
FILED
SEP 16 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 240

CENTRAL SURETY & INSURANCE CORPORATION,
A FOREIGN CORPORATION,
Petitioner,

vs.

ROYAL TRANSIT, INC., A FOREIGN CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

LEO J. LANDRY,
EUGENE WENGERT,
Attorneys for Respondent.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

Important Evidence.

		PAGE
1.	Evidence establishing that the negligent conduct of Schultz clearly constitutes the cause of the fall of the plates and the resulting injury to Zamecnik ...	2
2.	Evidence establishing that after creating this dangerous condition, Schultz was unmindful of the danger to others	3
3.	Evidence establishing that Shrake did not cause the plates to fall	3-4
4.	Evidence establishing that Zamecnik was not guilty of contributory negligence	4-5
5.	Evidence establishing that prior to the trial of the Zamecnik case, petitioner had full knowledge of the facts and circumstances upon which liability was predicated, and had full knowledge of the nature and extent of the injuries, and was not surprised by any of the testimony offered at the trial	5
6.	Evidence establishing that petitioner could have settled the Zamecnik case for $35,000 and that there was a consensus of opinion by all the attorneys that it was a liability case that should be settled for that amount	6
7.	Evidence establishing that the conduct of Miller constitutes bad faith	7
8.	Evidence disclosing a pattern of conduct on the part of petitioner that was neither intelligent nor honest	8

ARGUMENT.

I. The opinion of the Wisconsin Supreme Court in Zamecnik *vs.* Royal Transit, Inc. is not a proper subject of review because it turns entirely upon a question of local law 9

II. The Honorable United States Circuit Court of Appeals faithfully followed the decisions of the Wisconsin Supreme Court in applying the law to the facts 9-11

1. The insurance company must not abuse the power vested in it and recklessly and contumaciously refuse to settle if it is apparent that in all reasonable probability the damages will exceed the policy limit 9

a. The record discloses that Miller's refusal to discharge his obligation was arbitrary, capricious and without rational basis, and supports the finding of bad faith 10

2. The conduct of the insurance company in reference to claims of this nature must be subjected to close scrutiny to determine whether it acted in bad faith toward the insured 10

3. Good faith means being faithful to one's duty or obligation; bad faith means being recreant thereto 11

4. In the Lanferman Case the insured's attorney had informed the insurance company's counsel that he believed a verdict in excess of the policy limit would be returned and had demanded that the insurance company settle within those limits. The insurance company's attorney claimed that he would be able to obtain a finding of contributory negligence. No offer of settlement was made prior to trial. Held, the findings of bad faith was warranted 11

III. The decision of the Circuit Court of Appeals is not in conflict with the case of Berk *vs.* Milwaukee Automobile Ins. Co. 11-17

1. The Berk Case approved the rule stated in the Hilker Case that the insurance company's decision not to settle should be an honest decision. It should be the result of the weighing of probabilities in a fair and honest way. It must be honest and intelligent if it be a good faith conclusion 11-12
2. In the Berk Case the insured not only failed to request or suggest that the insurer make a settlement but *clearly* indicated that *no settlement* be made 12
   a. The insurer could hardly be guilty of bad faith toward its insured for refusing to make a settlement when such refusal was agreed to or joined into by the insured ... 12
3. The Kuhle Case, out of which the Berk case arose, involved a close question of law. The insurer and its attorneys vigorously contended that there was no liability 12-13
4. The facts in the Berk Case are clearly distinguishable from those in the instant case .. 13
5. The Berk Case does not modify or change the rule laid down in the Hilker Case but, on the contrary, quotes approvingly the rules therein stated 14
6. The Wakefield Case approves the rule laid down in the Wisconsin Zinc Co. Case 14
   a. The facts are clearly distinguishable from those in the instant case 14-15
7. The right to control the litigation in all of its aspects carries with it the correlative good faith, honest and conscientious fidelity to the common interest of the parties 15-16

IV. Petitioner's interpretation of the law in its application to the facts in the case at bar is clearly erroneous 16-17

Conclusion 17

TABLE OF CASES AND AUTHORITIES.

Berk v. Milwaukee Automobile Insurance Company, 245 Wis. 597 .....11, 12, 13, 14, 15

Kuhle v. Ladwig, 237 Wis. 147 .....12, 13

Hilker v. Western Automobile Insurance Co., 204 Wis. 1 .....10, 11, 12, 14, 15

Lanferman v. Maryland Casualty Co., 222 Wis. 406 ... 11

Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N. W. 643 14

Wisconsin Zinc Co. v. Fidelity & D. Co., 162 Wis. 39 .. 9, 14

Traders & General Ins. Co. v. Ruco Oil & Gas Co., 129 F. 2d 621 .....15, 16

Zamecnik v. Royal Transit, Inc., 239 Wis. 175 .....2, 4, 5, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. .....

CENTRAL SURETY & INSURANCE CORPORATION,
A FOREIGN CORPORATION,
Petitioner,

vs.

ROYAL TRANSIT, INC., A FOREIGN CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

ADDITIONAL STATEMENT OF FACTS.

Counsel for petitioner admit in their brief (Page 8) that, "There are no controverted issues of fact in this case." We deem it necessary to present some of these facts, omitted by petitioner, that are material to the consideration of the question presented.

IMPORTANT EVIDENCE.

1. Evidence Establishing That the Negligent Conduct of Schultz Clearly Constitutes the Cause of the Fall of the Plates and the Resulting Injury to Zamecnik.

A detailed description of the manner in which the steel plates were fastened on the truck appears in the opinion of the Wisconsin Supreme Court in the case of *Zamecnik* v. *Royal Transit, Inc.*, 239 Wis. 175 (R. 111-112). The proofs clearly establish that Schultz well knew that the usual and customary and only safe way of unloading such plates was to have them firmly attached to an overhead crane prior to the loosening and detaching of the chains that were holding them in a position of safety on the truck (R. 40, 45, 114-115). Nevertheless Schultz unfastened and removed the chains before the steel plates were attached to an overhead crane (R. 43-46, 49-51, 56). Two employees of Allis-Chalmers Co. warned Schultz of the danger (R. 50, 54). Schultz's only excuse was that he was getting impatient about the delay of unloading and wanted to get away (R. 45, 47). On this point the Wisconsin Supreme Court in the *Zamecnik* Case said (R. 115):

> "* * * As Schultz well knew the danger incidental to such loosening of the chains before the plates were hitched to the overhead crane, the record well warranted holding that Schultz was negligent in loosening the chains at the time and in the manner in which he did, and that such negligent conduct on his part clearly constitutes the cause of the fall of the plates and the resulting injury to Zamecnik and Shrake."

2. Evidence Establishing That After Creating This Dangerous Condition, Schultz Was Unmindful of the Danger to Others.

After creating this dangerous condition, Schultz was fearful that the plates would fall, so he took a position on the truck for his own safety (R. 44). Although he knew that a C-clamp had to be attached to the top of the plates before they could be attached to an overhead crane (Exhibit 11, page 377), Schultz did not warn Shrake of the danger when he saw him with a wrench to tighten the C-clamp. Schultz said that he was not concerned with what Shrake did (R. 44). Nor did he warn Zamecnik of the danger. He said that he did not say a word to anybody (R. 45).

3. Evidence Establishing That Shrake Did Not Cause the Plates to Fall.

Counsel for petitioner say in their brief, page 11:

> "* * * It is possible that Shrake caused the hook on the south plates to fall off, particularly in view of the testimony of Goyk that while he saw a hook on the plates which fell on the north side, he did not find the hook on the plates which fell on the south side. This is significant because it is undisputed that the plates on the south side fell first."

The reasoning of counsel for petitioner on this point is absolutely false, and their statement of the facts on page 9 of their brief is their own refutation. There they show the testimony of Goyk that he saw *Schultz* remove the hook from the top of the plates on the *south side*. This clearly establishes: (1) that Shrake did not cause the hook on the south plates to fall off; (2) that Goyk could not find the hook or chain on the plates on the south side, because

Schultz had previously removed the hook and placed it in the truck.

Nor is it perceived that there is any adequate basis for blaming Shrake who, in the regular routine of his duty, was climbing the ladder to attach the C-clamp to the chains, and was unaware of the dangerous condition created by Schultz. On this point the Supreme Court of Wisconsin in the *Zamecnik* Case said (R. 115-116):

> "• • • The ladder leaning inward against the outside of that set of plates and Shrake's weight, while standing on the ladder, necessarily tended rather to press the top of the plates inward and to thus retard their falling outward, instead of causing them to fall in that direction; and as it seems improbable that they could have fallen that way if Schultz had not released the chains before the plates were attached to the crane, his negligence in this respect can well be considered the sole cause of the accident, as was found by the Court."

4. Evidence Establishing That Zamecnik Was Not Guilty of Contributory Negligence.

There is the testimony of several employees of Allis-Chalmers Co. on this point and it is summarized by the Wisconsin Supreme Court in the *Zamecnik* Case as follows (R. 116):

> "• • • It appears from the record that the evidence admitted finding that Zamecnik, in returning to his place of work, was walking in an aisle designated by red lines as a place that was to be kept clear for walking purposes; that as he was proceeding between these safety lines toward the parked truck he saw the ladder leaning against the plates and when he was about even with the front end of the truck he saw also Benjamin Goyk, who was then about seventy-five to one hundred feet east of the truck and looking toward the right side thereof, 'hollering' and waving his arms, but

that Zamecnik did not know at whom Goyk was waving or of any impending danger; but that as Zamecnik looked up and saw the plates tipping over and the man and the clamp coming toward him, he put his hands over his head to try to get away, but was struck down by the falling plates.

"In view of these facts there does not appear to have been any failure on the part of Zamecnik to exercise ordinary care, * * *"

5. Evidence Establishing That Prior to the Trial of the Zamecnik Case, Petitioner Had Full Knowledge of the Facts and Circumstances Upon Which Liability Was Predicated, and Had Full Knowledge of the Nature and Extent of the Injuries, and Was Not Surprised by Any of the Testimony Offered at the Trial.

Miller, agent for petitioner who had complete control of all negotiations relative to settlement and compromise of the Zamecnik action and whose decision prevented a settlement, testified that he knew all of the facts before the trial, that he had examined all the reports, and that there was no new testimony introduced during the trial that surprised him (R. 96). On this point the Circuit Court of Appeals said (R. 176-177):

"The defendant was not surprised at any of the testimony offered at the Zamecnik trial, either as to the cause or extent of his injuries. All such facts were in its possession long prior to the trial; in fact, defendant emphasizes the thorough investigation which it made and the complete information which it possessed relative to the Zamecnik claim. * * * While the lack of a proper investigation may be evidence of bad faith, it does not follow that a proper investigation and ascertainment of the facts is sufficient to establish good faith. Having thus obtained the facts, it was still charged with the duty of acting upon the same in a good-faith manner."

6. Evidence Establishing That Petitioner Could Have Settled the Zamecnik Case for $35,000 and That There Was a Consensus of Opinion by All the Attorneys That It was a Liability Case That Should Be Settled for That Amount.

Prior to the commencement of the *Zamecnik* Case, the attorneys for petitioner wrote a letter to respondent stating that there was the "*likelihood*" that a judgment might be entered for an amount "*much in excess*" of the policy of insurance (R. 119, Exhibit 19). In commenting on this letter, the Circuit Court of Appeals said (R. 176):

> "* * * Thus, in the beginning the attorneys for the defendant recognized both the likelihood of liability to Zamecnik and that the character of his injuries was such that a judgment might be obtained in excess of $45,000, defendant's maximum liability."

Counsel for respondent repeatedly urged settlement and offered to contribute $3,500 in behalf of respondent in order to effect a settlement (R. 71-72). Later, he offered to contribute $5,000 toward the settlement (R. 75, 78, 82). It is admitted by counsel for petitioner (Petition, page 2) that the case could have been settled for $40,000, of which amount the respondent agreed to pay $5,000. Attorney Paulsen, who represented the reinsurance company, testified that he considered right along that it was a liability case that should be settled and he urged settlement for $35,000, and Attorney Arnold, who was in charge of the trial for petitioner, was in hearty accord (R. 77). As said by the Circuit Court of Appeals (R. 177):

> "* * * It is implicit in the testimony concerning these conferences as well as the proceedings at the conciliation hearing that all the attorneys recognized that Zamecnik could establish liability."

7. Evidence Establishing That the Conduct of L. P. Miller Constituted Bad Faith.

In an attempt to justify his refusal to settle the *Zamecnik* case, Miller gave three different reasons:

A. He testified that he treated the matter as a horse-trading proposition (R. 94). On this point the Circuit Court of Appeals said (R. 178):

> "* * * We assume that even a 'horse trader' if successful must at some point make an offer."

B. He testified that he was waiting for Zamecnik to submit a figure less than $45,000 (R. 95). This excuse is false for it is admitted that Miller refused an opportunity to settle for petitioner for $35,000.

C. He testified later that his refusal to settle was predicated on lack of negligence on the part of Schultz (R. 95). This excuse is without substance, for the record is clear and conclusive that Schultz was negligent.

The attitude of Miller is fairly presented by the Circuit Court of Appeals as follows (R. 178):

> "As to Miller's attitude, the lower court found:
> '* * * that said Miller stubbornly and persistently refused to adopt any of the suggestions of other attorneys of wide experience in negligence cases when they advised settlement for less than the policy coverage and he obstinately and in bad faith repudiated and overrode the suggestions of the attorneys for the reinsurer and defendant's own attorneys who were conducting the defense of the Zamecnik case when they both advised and urged settlement for $35,000.'
> "We think the evidence adequately supports the characterization which the court thus applied to Miller."

8. Evidence Disclosing a Pattern of Conduct on the Part of Petitioner That Was Neither Intelligent Nor Honest.

When counsel for respondent urged settlement, the attorneys for petitioner warned that such attitude "does not constitute an attitude of cooperation and compliance with the terms of the policy" (R. 120, Exhibit 20). Counsel for respondent wrote to the attorneys for the petitioner that respondent would look to petitioner for indemnification in the event judgment exceeded the liability provided for in the policy, and urged settlement in accordance with the offer of settlement submitted (R. 121, Exhibit 21). In reply, the attorneys for petitioner said that respondent would not be justified in settling and that petitioner would challenge any act of settlement (R. 122, Exhibit 22). After judgment had been entered, counsel for respondent wrote to the attorneys for petitioner stating that respondent could settle for $15,000 and requested permission to do so (R. 123, Exhibit 23-A, 124, Exhibit 24-A). Petitioner refused and again warned against any action that would constitute a violation of the cooperative clause of the policy (R. 126, Exhibit 25).

ARGUMENT.

I.

The Opinion of the Wisconsin Supreme Court in Zamecnik v. Royal Transit, Inc., Is Not a Proper Subject of Review.

The *Zamecnik* Case, out of which the instant case arose, turns entirely upon a question of local law. It was there decided that the negligent conduct of Schultz *clearly* constitutes the cause of the fall of the plates and the resulting injury to Zamecnik. The statement of facts presented justifies this conclusion. Nevertheless, counsel for petitioner in their brief (Pages 9-14) devote considerable criticism of the opinion of the Wisconsin Supreme Court.

II.

The Honorable United States Circuit Court of Appeals Faithfully Followed the Decisions of the Wisconsin Supreme Court in Applying the Law to the Facts.

Indeed, the District Court and the Circuit Court of Appeals could have rendered no other decision upon the undisputed facts without ignoring the principle well settled in the State of Wisconsin which had been in existence for over one-quarter of a century. In 1916 in the case of *Wisconsin Zinc Co.* v. *Fidelity & D. Co.*, 162 Wis. 39, 54, the rule was stated:

> "• • • While the defendant had the right to consult what it deemed to be its own interest in making a settlement, it could not abuse the power vested in it and recklessly and contumaciously refuse to settle if it was apparent that in all reasonable probability its conduct would not only result in damage to the plaintiff but also in loss to itself."

A fair appraisal of Miller's stubborn refusal to accept any offer of settlement, or to make any counter proposal, is made by the Circuit Court of Appeals (R. 178):

> "In our judgment, the record discloses that his refusal to discharge this obligation was arbitrary, capricious and without any rational basis, and certainly the finding of bad faith is amply supported."

In the case of *Hilker* v. *Western Automobile Ins. Co.*, 204 Wis. 1, the policy limit was $5,000. A judgment of $10,500 was recovered. The action could have been settled within the policy limit, probably for $3,000. The Supreme Court said (page 8):

> "The interests of the insurance company being to so large an extent adverse to those of the plaintiff, its conduct while acting as agent of the plaintiff with reference to these claims must be subjected to close scrutiny in order to determine whether it acted in bad faith toward the plaintiff."

And (page 9):

> "With this evidence in the case, the jury were warranted in finding that a good-faith effort to protect the interests of the plaintiff required the company to do something more than to suggest an adjustment by the payment of such sums as $500, or even $1,500."

And (page 10):

> "* * * Under such circumstances the failure to make some more effective effort to adjust the cases does present evidence which sustains the finding that the defendant acted in bad faith toward the plaintiff in handling these claims and conducting this litigation."

Upon motion made for a rehearing in the *Hilker* case, Mr. Justice Owen handed down a "clarifying" opinion, stating (page 13):

> "* * * The subject has received our earnest reconsideration, and it is to be hoped that what is here

said will be characterized by a degree of clarity that will enable the views of this court, upon a question which seems to be in more or less tautological confusion, to be understood.* * * Bad faith, especially, is a term of variable significance and rather broad application. Generally speaking, good faith means being faithful to one's duty or obligation; bad faith means being recreant thereto."

In the case of *Lanferman* v. *Maryland Casualty Co.*, 222 Wis. 406, the policy limit was $5,000; a judgment in excess of $15,000 was recovered. The case could have been settled for the policy limit. The insured's attorney had informed the insurance company's counsel that he believed a verdict in excess of the policy limit would be returned and had demanded that the insurance company settle within those limits. *No offer of settlement was made prior to trial.* The insurance company's attorney claimed that he would be able to obtain a finding of contributory negligence. The Supreme Court said (page 409):

"* * * Upon the testimony as to all these matters, which the jury might rightly believe, we consider that the findings of bad faith on the part of the defendant was warranted."

III.

The Decision of the Circuit Court of Appeals Is Not in Conflict With the Case of Berk v. Milwaukee Automobile Ins. Co., 245 Wis. 597.

Indeed, the Circuit Court of Appeals carefully analyzed the *Berk* case and recognized the facts that distinguish it from the instant case. The court said (R. 173-174):

"In the Berk case, the latest of the Wisconsin Supreme Court cases, while the judgment was reversed because of the insufficiency of the proof to sustain a finding of bad faith, the court nevertheless recognized

the duty imposed upon an insurer as announced in its previous decisions. For instance, on page 602, it quoted with approval from its former decision in the Hilker case, as follows:

"'But because it has taken over this duty, and because the contract prohibits the insured from settling, or negotiating for a settlement, or interfering in any manner except upon the request of the insurer, such as assisting in the securing of witnesses, etc., its exercise of this right should be accompanied by considerations of good faith. Its decision not to settle should be an honest decision. It should be the result of the weighing of probabilities in a fair and honest way. * * * It must be honest and intelligent if it be a good-faith conclusion.'"

Then the Circuit Court of Appeals comments further as follows (R. 174):

"Notwithstanding the strong reliance which defendant places upon the Berk case, we think it is so clearly distinguishable on the facts as to furnish little if any support for defendant's contention in the instant case. One circumstance alone may be mentioned. There, as pointed out by the court, the insured not only failed to request or suggest that the insurer make a settlement but 'clearly indicated that no settlement be made.' It is difficult to discern how the insurer in any case could be guilty of bad faith toward its insured for refusing to make a settlement when such refusal was agreed to or joined into by the insured."

The *Berk* case arose out of the case of *Kuhle* v. *Ladwig*, 237 Wis. 147. In that case, the insurer contended that Kuhle, at the time of his fatal injury, was engaged in an illegal and criminal enterprise, and that an injury to one while engaged in such a transaction could not be made the basis of an action for damages. As the court said in the *Berk* case (Page 608):

"* * * upon their full investigation of the facts and law they (the insurer and its attorneys) concluded

that it was a case of no liability. The contention of respondent that defendant did not rely on the advice of its counsel is contrary to the undisputed evidence."

And (page 605):

"Defendant's adjusters and attorneys have vigorously contended from the start to the present time that there was no liability in the Kuhle case. Ladwig never requested or even suggested that defendant make a settlement in the Kuhle case. On the contrary, he clearly indicated that no settlement be made."

And (page 608):

"* * * There is no evidence that any settlement could have been made, after trial in the circuit court, and prior to the commencement of the present action, for less than the full amount of the judgment."

It is apparent, therefore, that the facts in the instant case clearly distinguish it from the *Berk* case in the following respects:

(A) In the instant case, it was apparent that liability would exceed the policy limit and the attorneys agreed it was a case of liability.

(B) The insured urged settlement and offered to contribute $5,000 to effect a settlement.

(C) Petitioner could have settled for $35,000 and was urged to do so by the attorneys.

(D) Miller refused the offer and refused to make any counter proposal, justifying his decision on the following grounds:

1. That he considered it a "horse-trading proposition."

2. That he was waiting for Zamecnik to submit a figure less than $45,000. (It is admitted that he could have settled for $35,000.)

3. That his refusal to settle was predicated on lack of negligence on the part of Schultz.

(E) Settlement could have been made after trial for less than the full amount of the judgment.

Therefore, the conclusion to be drawn from an analysis of the *Berk* case is:

(1) The facts in the *Berk* case are clearly distinguishable from those in the instant case.

(2) Not only is there no suggestion in the opinion in the *Berk* case to modify or change the rule laid down in the *Hilker* case but, on the contrary, the court quotes approvingly the rules therein stated.

Moreover, it is significant that the case of *Wakefield* v. *Globe Indemnity Company,* 246 Mich. 645, 225 N. W. 643, relied upon by petitioner, quotes approvingly the rule from the *Wisconsin Zinc Co.* case, which we have heretofore set forth in full. After an examination of the opinion of the court and the facts presented, it is clearly apparent that the Michigan court approves the rules stated in the *Hilker* case. The court said that there is but one criterion by which one's action in deciding matters in which the rights of others are involved should be judged, and that is (page 646):

"Did they exercise an honest judgment?"

The court then calls attention to the fact that two defenses were being interposed, and, if either of them should be sustained as a matter of law, plaintiff could not recover in any amount. One of the defenses involved a legal question that had never been considered by the Michigan Supreme Court. Counsel for the defendant cited several decisions of courts in other jurisdictions which supported its claim in this respect. Commenting on these facts, the court said (page 647):

"* * * Mr. Campbell's declination of the offer was but an expression of confidence on his part that the legal defenses interposed were well taken. Surely it cannot be said to have been actuated by a lack of honest or fair dealing towards the city, amounting to what, in law, is denominated 'bad faith' * * *"

The observations are peculiarly apt when applied to the acts in that case. On the other hand, it would be inaccurate and a tortured construction of the facts in the case at bar to say that petitioner was actuated by "honest or fair dealing" towards the respondent.

In the *Berk* case, *supra*, the court quoting approvingly from the *Hilker* case, said (page 603):

> "* * *In order that it be honest and intelligent it must be based upon a knowledge of the facts and circumstances upon which liability is predicated, and upon a knowledge of the nature and extent of the injuries so far as they reasonably can be ascertained."

Miller admits he knew all the facts disclosing liability; he knew that Zamecnik had a permanent and total disability and that the damages would greatly exceed the policy limit (R. 95). No new testimony was introduced during the trial that surprised him, or that would change his opinion (R. 96). The question to which no adequate answer has as yet been given is: How could Miller hope to settle the case if he rejected all offers of settlement approved by petitioner's attorneys and refused to suggest any counter proposal? We believe the District Court expressed it properly by saying (R. 148):

> "* * * Apparently he liked the idea of gambling with the money of other people."

And (R. 150):

> "* * * In the case at bar we have a stubborn, unyielding Mr. Miller, deaf to entreaties and advice alike, who in his own words 'was engaged in a game of horse trading.'"

Miller brazenly abused the power of settlement vested in him. As the court stated in *Traders & General Ins. Co.* v. *Rudco Oil & Gas Co.*, 129 F. 2d 621, 627, with reference to a similar situation:

> "Exclusive authority to act does not necessarily mean the right to act arbitrarily.* * * The right to control the litigation in all of its aspects carries with it the correlative good faith, honest and conscientious fidelity to the common interest of the parties."

It is, in effect, the identical rule stated by the Wisconsin Supreme Court in the case of *Wisconsin Zinc Co.* v. *Fidelity & D. Co.*, 162 Wis. 39, 54, hereinbefore stated.

IV.

Petitioner's Interpretation of the Law in Its Application to the Facts in the Case at Bar Is Clearly Erroneous.

We pause now to draw together and generalize the undisputed testimony heretofore presented and the contention of petitioner, because, together, they illustrate the fallacy of petitioner's interpretation. In effect, petitioner advances the following argument:

We were not surprised at any of the testimony offered at the Zamecnik trial, either as to the cause or extent of his injuries because all the facts were in our possession long prior to the trial. The facts clearly established that Schultz's negligence was the cause of the injuries to Zamecnik, and that such injuries were serious and permanent. We warned respondent that there was the likelihood that a judgment might be entered for an amount much in excess of the limit of the policy of insurance. All the attorneys considered the case as one of absolute liability, but when respondent urged settlement and offered to contribute $3,500 toward the settlement, our agent, Miller, refused to settle and we warned respondent that its attempts to settle were in violation of the cooperative clause of the policy. Later Zamecnik offered to settle for $40,000 and respondent offered to contribute $5,000 if we would pay the other $35,000. Although our attorneys were in

hearty approval of this offer, and the attorney for the reinsurance company urged us to accept, Miller again refused and also refused to make any counter proposal. It is true that Miller gave no rational basis for his refusal. After judgment, the respondent could have settled for less than the judgment, but we refused to consent to such a settlement. While it is true that Miller was stubborn and obstinate and his decision to litigate rather than to compromise was arbitrary, capricious, and without rational basis, and while it is unfortunate that he treated the matter as "a horse trading proposition" and thereby caused substantial loss to respondent and the insurance companies, nevertheless we contend that there is no basis for a conclusion of bad faith.

Certainly, that is not the law in Wisconsin. It is the essence of unfairness and bad faith, as the authorities heretofore cited conclusively demonstrate. The facts clearly justified finding the petitioner guilty of bad faith.

Conclusion.

We submit that the judgment of the Circuit Court of Appeals is a most righteous one. Examination of the opinions of the Supreme Court of the State of Wisconsin shows that the Circuit Court of Appeals faithfully followed the decisions of the Wisconsin Supreme Court in applying the law to the facts. We do not perceive that petitioner has cited any authority sustaining its position.

We submit, therefore, that the application of petitioner for a writ of certiorari should be denied.

Respectfully submitted,

Leo J. Landry,
Eugene Wengert,
Attorneys for Respondent.